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Supreme Court, U.S.
FILED

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UNITED STATES SUPREME COURT

OCTOBER 1996 TERM

MARIA FELINSKA,
PETITIONER

V.

NEW ENGLAND TEAMSTERS AND TRUCKING
INDUSTRY PENSION FUND,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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By her attorney,
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26 pp

Whether the United States Court of Appeals for the First Circuit erred in Affirming the United States District Court for the District of Massachusetts which had Ruled that the Plaintiff-Appellant-Petitioner below, Maria Felinska, had failed to meet her burden at Summary Judgment to produce evidence sufficient to sustain a finding that the Defendant-Respondent, New England Teamsters and Trucking Industry Pension Fund (hereinafter the **Teamsters**), had discriminated against Felinska within the meaning of 29 U.S.C. S. 623, the Age Discrimination in Employment Act.

LIST OF PARTIES

See Caption pursuant to Rule 14.1.(b).

CITATIONS TO UNOFFICIAL REPORTS

United States District Court, District of Massachusetts, No. 93-10242-NG

United States Court of Appeals for the First Circuit - No. 96-1589.

JURISDICTIONAL BASIS

Date of Judgment Sought to Be Reviewed

November 6, 1996

Date of Order Respecting Rehearing

November 27, 1996

Statutory Provision Conferring Jurisdiction to Review Writ of Certiorari

28 U.S.C. 1254(1).

STATUTE INVOLVED

29 U.S.C. 623. AGE DISCRIMINATION IN EMPLOYMENT ACT. Please see Appendix for full text.

STATEMENT OF THE CASE

The below case was one for age discrimination in employment under federal law. Felinska had resigned under extreme mental duress after several years of cruel mistreatment from her employment with the Teamsters in late March, 1991, because her working conditions had become objectively intolerable. She had served the Teamsters for over twenty-five loyal years. The only issue contested at the time Defendants Moved for Summary Judgment was whether Defendant, Teamsters, had violated the ADEA in causing Felinska's resignation from employment (the constructive discharge issue).

BASIS OF FEDERAL JURISDICTION IN THE U.S. DISTRICT COURT

28 U.S.C. 1331, Federal Question.

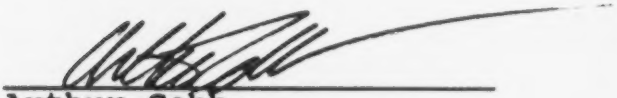
ARGUMENT

The U.S. Court of Appeals for the First Circuit did not correctly apply 29 U.S.C. 623 to the facts of the case below. The Court ignored the bulk of the summary judgment record respecting clear disparate treatment in favor of the younger co-worker whom Felinska was forced to train to take her own job. This clearly created a genuine issue of material fact that the Petitioner, Felinska, had been discriminated against in the terms and conditions of her employment on account of her age.

The said Appeals Court's Decision conflicts with relevant decisions of the U.S. Supreme Court. Namely, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and St. Mary's Honor Center v. Hicks, --U.S.--, 113 S.Ct. 2742 (1993) jointly require that once Felinska had evidence sufficient to sustain a finding that the Teamster's reasons for disparately treating her were pretextual, and that mendacity was ever present in the Teamster's feigned legal posturing, then an inference could be drawn that the

real reason for Felinska's mistreatment at the hands of the Teamsters was age discrimination.

Respectfully submitted,
Maria Felinska,
By her attorney,



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APPENDIX

Judgment of U.S. Court of Appeals sought to be reviewed .. Page 1

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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1589

MARIA FELINSKA,

Plaintiff, Appellant

v.

NEW ENGLAND TEAMSTERS AND TRUCKING INDUSTRY PENSION FUND,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[HON. Nancy Gertner, U.S. District Judge]

Before

Cyr, Boudin and Lynch, Circuit Judges.

Matthew Cobb for Appellant.
Anne McCully Murphy with whom Charles P. O'Connor, Morgan, Lewis & Bockius, LLP, Christopher N. Souris and Feinberg, Charnas & Birmingham, P.C. are on brief for appellee.

November 6, 1996

Per Curiam.

Maria Felinska appeals from the district court's summary judgment dismissing her claim that her former employer had discriminated against her by constructively discharging her because of her age in violation of the Age Discrimination in Employment Act, 29 U.S.C. 621, et seq. The District Court ruled that Felinska had not presented a prima facie case because, even accepting her allegations of fact as true, they did not demonstrate a constructive discharge. Greenberg v. Union Camp Corp., 48 F.3d 22, 26 (1st.Cir. 1995). After viewing the parties briefs and the record, we affirm substantially for the reasons given by the District Court.

Affirmed.

ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No. 93-10242-NG

MARIA FELINSKA,
Plaintiff

v.

NEW ENGLAND TEAMSTERS AND TRUCKING INDUSTRY PENSION FUND and CHARLES LANGONE, FUND MANAGER of the NEW ENGLAND TEAMSTERS AND TRUCKING INDUSTRY PENSION FUND,

Defendants

February 20, 1996

MEMORANDUM AND DECISION

GERTNER, D.J.

For approximately 26 years, plaintiff Maria Felinska worked as a bookkeeper for the defendant New England Teamsters and Trucking Industry Pension Fund ("the Fund"). Felinska began working in 1965 as one of two bookkeepers at the Fund. After the departure of her co-worker, Felinska became the Fund's principal bookkeeper, a position she held until her resignation on

March 29, 1991.

Subsequent to her resignation, Felinska brought this action against the Fund and its director, Charles Langone. She alleged, under various theories, that her resignation had not been voluntary, but rather a constructive discharge resulting from unlawful discrimination. She also made claims of defamation and intentional infliction of emotional distress. On prior motions, a judge of this court dismissed all of Felinska's claims except those alleging age discrimination (in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq.) (Counts I, III, IV, VI and XIII), and defamation (Count XII).[1]

Defendants now move for summary judgment with respect to the remaining claims. Plaintiff has not opposed the motion with respect to her defamation claims, nor with respect to her ADEA claims to the extent they relate to an alleged attempt to avoid paying her a higher pension benefit. Plaintiff has also not opposed defendant Langone's motion to dismiss the ADEA claims against him, since he was never named in an EEOC charge. This leaves plaintiff's age discrimination claim against the Fund for consideration by the court.

II. FACTS

From about 1966 to 1975, Felinska was the Fund's sole bookkeeper. In 1975, the Fund hired an additional bookkeeper, Dorothy Langone, because it was felt that the Fund had more work than Felinska could handle on her own. Ms. Langone worked at the Fund, alongside Felinska, until she died in 1988.

After Ms. Langone's demise, Felinska temporarily took up some of her duties. In the spring of 1989, however, the Fund assigned Marilyn Tower, who had been working in the Fund's data processing department, to fill Ms. Langone's position. Tower apparently did not have extensive bookkeeping experience, and, according to Felinska, the Fund sent her to a bookkeeping course shortly after she took over the position. In addition, Felinska was instructed by Helen Debreceni, the then Fund manager, to train Tower in bookkeeping functions.

In the summer of 1989, Debreceni appointed Arlene Brewster to be Felinska's and Tower's immediate supervisor. Brewster and Felinska apparently did not take to each other. In one incident, in the fall of 1989, Felinska went on vacation for three weeks and Brewster was unable to locate the Fund's general ledger book. Upon Felinska's return, Brewster asked her, at approximately 7:30 a.m.,

where the general ledger was. First, Felinska said that it was on a shelf, but it was not. Then she said that she would give Brewster the ledger, but not until 7:55 a.m. As a result, Felinska received a formal warning from Debreceni.

In May of 1989, the Fund began to computerize its accounting system, using the "Solomon III" system from IBM. IBM provided training to Fund staff members and Felinska was told, either by Debreceni or another supervisor, Eve Kertesz, that she (Felinska) would be trained to use the computer system along with Tower.

Felinska was disappointed in a number of aspects of the computerization process. First, she contends, the computer terminal which the Fund ordered was "left handed." According to Felinska, this meant that the terminal platform had a slightly larger workspace to the left of the keyboard than to the right. Felinska is right-handed, while Tower is apparently left-handed. Felinska admits, however, that right-handed people are able to use the terminal.

Felinska also contends that Tower received preferential training on the computer system over herself. While she admits that, on a number of occasions, she received training along with

Tower from IBM trainers, she contends that Tower sat at the terminal more frequently than she did during the training sessions, that the instructor tended to address himself more towards Tower than herself, and that she received training only in operating the accounts payable function of the system. In her deposition, however, Felinska admits that numerous other topics were covered in the training sessions which she attended. Felinska also admits that Tower was more skillful on the computer than she was.

Eventually, Felinska complained to Debreceni that she was not receiving an equal amount of training from the instructors. Debreceni told her that the instructor would teach Tower, who would then teach her. Felinska also acknowledges that she was permitted to take training manuals home to read, and that sometimes Tower would explain how to operate certain of the functions. Ultimately, Felinska admits that she spent some time every day practicing on the new computer system and that, as of the time she left the Fund, she had at least an average ability to use the system.

On February 28, 1990, Felinska filed a written notice of resignation to the Fund, effective March 30, 1990. She told Debreceni that she was quitting because

she had a job at Chemical Bank. She also said that she was leaving because of Arlene Brewster, although she made no specific complaints about her. After Debreceni asked her to stay, she changed her mind and agreed to stay.

In October 31, 1990, Felinska once again filed a notice of resignation with the Fund. This time she complained to Debreceni that she was leaving because the job made it difficult to travel to New York City on the weekend. Debreceni once again asked her to stay, and agreed to allow Felinska to leave 15 minutes earlier on Fridays to avoid this problem. Once again Felinska changed her mind and agreed to stay with the Fund.

In October of 1990, Debreceni retired, and Charles Langone became the Fund Director. Langone had not been involved in appointing Arlene Brewster. He now says that he might not have made that choice had it been his to make. He describes Brewster as lacking "people skills," and having a reputation for being overbearing and tactless with all employees. He says that he did not immediately remove her from her position, however, because he wanted to observe her effectiveness.

Felinska admits that she had a good relationship with
Langone, and Langone states that he thought Felinska's work was satisfactory.

Felinska however, continued to resent Brewster's managerial style. In January, 1991, she told Langone that Brewster was impossible to work with and that if he did not do something about it, she would quit. However, she does not remember making any specific complaint about Brewster. In response, Langone asked her to stay, and she agreed. Felinska only remembers one other incident (before her final departure from the Fund) in which she complained to Langone about Brewster, after Brewster berated her for making an improper tax payment on an account.

Finally, on March 29, 1991, Felinska once again tendered her resignation. She met with Langone and told him that she liked the office, liked the people she worked with, and liked the work, but that she could no longer work under Brewster. She gave Langone two examples of what Brewster had done. In one incident, she had asked Brewster for permission to leave the office two hours early for a doctor's appointment and apparently Brewster said words to the effect of "you will leave when I want you to." Brewster eventually gave her permission to leave.

The second problem Felinska described to Langone involved an incident in which Brewster had reprimanded Felinska for making an incorrect entry in the computer,

supposedly after receiving instructions to do so from another employee.

In response to Felinska's complaints, Langone once again asked her to stay. According to Felinska, he repeated the word "stay" three times. Felinska responded "why should I stay?", and reiterated that she could not work with Brewster. When Langone refused to authorize a transfer, she left the meeting. According to Felinska, she changed her mind about resigning only a few minutes after the meeting was over, but by that time, Langone was busy meeting with someone else and so she could not talk to him. Instead, she saw Langone at the end of that day and asked him to allow her to rescind her resignation; this time he refused.

Four months after Felinska resigned, on July 17, 1991,
Felinska wrote to Langone, asking if she could have her job back. Her request was refused. After Felinska's resignation, Tower absorbed most of her duties. In May, 1991, Langone hired Susan Beaulieu to assist Tower in some of Felinska's duties. She remained in this position until January, 1993. In 1995, Langone transferred Tower to another department, and hired a new bookkeeper to perform the duties once performed by Felinska and Tower.

III. DISCUSSION

A. Legal Framework

In an ADEA action, the burden of producing evidence is governed by the framework described in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). Greenberg v. Union Camp Corp., 48 F.3d 22, 26 (1st Cir. 1995). The plaintiff has the initial burden of establishing a prima facie case of discriminatory discharge. This requires the plaintiff to establish that (i) she is over age 40, (ii) that she was performing adequately on the job, (iii) that she was actively or constructively discharged, and (iv) that she was replaced by a person with roughly equivalent job qualifications. Greenberg, 48 F.3d at 26.

Once the plaintiff has met this burden, the employer is obliged to articulate a legitimate reason for the plaintiff's discharge. If the employer has articulated a legitimate reason for the discharge, the burden shifts back to the plaintiff to demonstrate that the articulated reason was a pretext for discriminatory animus. Of course, if the plaintiff fails to produce a prima facie case in the first instance, and in particular fails to show that she was discharged, the inquiry ends at that point, and the plaintiff loses.

Greenberg, 48 F.3d at 27.

Since it is undisputed in this case that plaintiff was not actually discharged, but resigned from her position, she can only succeed if she can demonstrate that her resignation was the result of a constructive discharge. A finding of constructive discharge is warranted when the evidence shows that an employee's "new working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Greenberg, 48 F.3d at 27; Calhoun v. Acme Cleveland Corp. 798 F.2d 559, 561 (1st Cir. 1986) The test is an objective one, and an employee will not prevail simply because she is unreasonably sensitive to her working environment. Rather, the inquiry focuses on the "reasonable state of mind of the putative discriminatee." Greenberg, 48 F.3d at 27; Calhoun, 798 F.2d at 561.

The evidence adduced by plaintiff in this case is insufficient for a rational jury to conclude that she was constructively discharged from her position. The sum total of the difficult or unpleasant working conditions described by plaintiff are as follows:[2]

a) She did not have a friendly relationship with her co-worker Tower, or her supervisor Brewster;

b) She received less training on the computerized accounting system than did Tower, however this did not prevent her from achieving "at least average" ability to use it;

c) The computer terminal was left-handed, while she was right-handed, but this did not prevent her from using it;

d) She was reprimanded for refusing to cooperate with Brewster in locating the missing general ledger, a complaint that she admits in substance;

e) Brewster gave Tower preference in choosing which days she would take as vacation days;

f) Brewster once told her that she "looked like a Gypsy" and that her accent would disqualify her for jury duty;

g) On a number of occasions, Brewster stated to- Felinska, "what do you think, you are not replaceable?";

h) Brewster gave Tower most of the computer-related assignments, and did not permit Felinska to talk directly with the Fund's computer consultants;

i) In March of 1991, Langone gave plaintiff a large bookkeeping assignment to complete "in a few days." When Felinska stated that it would be impossible to complete it on time, Langone threatened to

give the assignment to Tower;[3] and,

j) On March 28, 1991, Brewster instructed Felinska to give her "batch control" work to Tower.

This litany of unpleasant experiences, while surely causing discomfort on plaintiff's part, simply does not rise to the level of a constructive discharge. First, it must be noted that the events described by Felinska took place over a two year period. Plaintiff does not describe continuous harassment or demeaning interactions during this period, but only a series of isolated incidents, most of which cluster over a year prior to her resignation. Compare Aviles-Martinez v. Monroig, 963 F.2d 2, 6 (1st Cir. 1992) (evidence sufficient to find constructive discharge where plaintiff was scolded and ridiculed in front of clients on an almost daily basis).

Also missing from plaintiff's account is any pressure from management to resign. She was never threatened, never given an ultimatum, and never demoted. Her salary was never reduced during the period in question. To the contrary, plaintiff appears to have used the threat of resignation on a number of occasions to extract concessions from management, who appear to have taken steps to placate her in order to prevent her from leaving. Compare Calhoun v. Acme Cleveland Corp.,

798 F.2d 559, 562 (1st Cir. 1986) (evidence sufficient to find a constructive discharge where management repeatedly asked plaintiff to resign, demoted him, and threatened longer working hours unless he resigned).

What the evidence does show is that plaintiff, who had, for 25 years, been the dominant presence in the bookkeeping department, felt threatened by its automation, and by the presence of Tower, who, she acknowledges, had more expertise with computers than did she. While plaintiff did receive some computer training, it is apparent from the record that management intended Tower to be the "computer person" in the bookkeeping department, and that plaintiff's duties would remain primarily those she had always done: manual bookkeeping Plaintiff acknowledges that even though Tower was given the bulk of the computer work, she continued to perform the manual bookkeeping functions.[4]

Plaintiff's pride was, understandably, injured by this change in office dynamics, and Brewster's less than diplomatic treatment clearly exacerbated plaintiff's hurt feelings. However, while this outcome is unfortunate, it does not rise to the level of a compelled resignation. See Hazel v. Postmaster General, 7 F.3d 1, 45 (1st Cir. 1993) (reassignment to a less desirable job held

not to be constructive discharge).

Accordingly, defendant's motion for summary judgment on all remaining counts is ALLOWED.

SO ORDERED.

Dated: February 20, 1996

"S/ _____"
NANCY GERTNER, U.S.D.J.

FOOTNOTES TO OPINION ABOVE:

1. At a hearing on April 29, 1994, Young, J. dismissed Count I as it related to national original discrimination, Count IV (purporting to state a claim under M.G.L. ch. 151B) and Count XIV (purporting to state a claim under ERISA). In a written opinion dated June 8, 1994, Judge Young dismissed Count II (Massachusetts Civil Rights Act), Count V (M.G.L. ch. 93 § 103), Counts VII and VIII (intentional infliction of emotional distress), Count IX (interference with advantageous relations), Count X (negligent misrepresentation), and Count XI (negligent supervision).

2. Certain of plaintiff's evidence was in the form of hearsay and speculation, and has been excluded from this list.
3. Nothing in the record suggests that Langone carried out this threat.
4. At her deposition, plaintiff stated: "But it was two bookkeeping [sic]. One was the manual bookkeeping and one was the computer bookkeeping. So Marilyn was doing more computer bookkeeping. So Marilyn was doing more computer and I have done what I have done all the years."

ORDER ON REHEARING

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1589

MARIA FELINSKA,
Plaintiff, Appellant

v.

NEW ENGLAND TEAMSTERS AND TRUCKING INDUSTRY PENSION FUND,
Defendant, Appellee.

Before
Cyr, Boudin and Lynch, Circuit Judges.

ORDER OF COURT

Entered: November 27, 1996

Upon consideration of appellant's petition for rehearing, it is ordered that said petition be denied.

By the Court:

William H. Ng, Clerk
By: "No signature"

Chief Deputy Clerk.

STATUTORY PROVISION AT ISSUE.

29 U.S.C.§ 623. Prohibition of age discrimination.

- (a) Employer practices
-

It shall be unlawful for an employer -

- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
-
- (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
-
- (3) to reduce the wage rate of any employee in order to comply with this chapter.